SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 302

FELT AND TARRANT MANUFACTURING CO.,
Appellant,

vs.

JOHN C. CORBETT, FRED E. STEWART, RICHARD E. COLLINS, ET AL., ETC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

STATEMENT AS TO JURISDICTION.

THOMAS R. DEMPSEY,
A. CALDER MACKAY,
WELLMAN P. THAYER,
HOWARD W. REYNOLDS,
Counsel for Appellant.

INDEX.

Subject Index.

Table of Cases Cited.

Statutes Cited.

IN THE

DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

EQUITY.

No. 1284-J

FELT AND TARRANT MANUFACTURING CO., A CORPORATION, *Plaintiff*,

vs.

JOHN C. CORBETT, FRED E. STEWART, RICHARD E. COLLINS, RAY L. EDGAR, AND HARRY B. RILEY, AS MEMBERS OF THE STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA; STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, AND U. S. WEBB, THE ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, *Defendants*.

STATEMENT OF BASIS OF JURISDICTION OF SUPREME COURT.

Pursuant to Supreme Court Rule 12, Felt and Tarrant Manufacturing Co., the plaintiff above named, upon presentation of its petition for the allowance of an appeal to the Supreme Court of the United States from the decree of the above named District Court rendered in this cause,

presents the following statement disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on appeal to review the said decree.

(a) Statutory Provision Believed to Sustain the Jurisdiction.

Judicial Code, Section 238, Subdivision 3, as amended by Act of February 13, 1925, c. 229, 43 Stat. 938 (28 U. S. C., Sec. 345), and Section 266, as amended (28 U. S. C., Sec. 380).

(b) The California Statute.

The statute of the State of California, the validity of which is involved herein, is the Use Tax Act of 1935 (Stats. 1935, Chap. 361, as amended by Stats. 1937, Chaps. 401, 671 and 683), a copy of which is appended to the bill of complaint.

The statute in question imposes an excise tax on the storage, use or other consumption in the State of California of tangible personal property purchased from a retailer on or after July 1, 1935, for storage, use or other consumption in said State, at the rate of 3% of the sales price of such property. Every person storing, using or otherwise consuming in said State such property purchased from a retailer is declared liable for the tax, and the liability continues until the tax is paid to the State; provided, that a receipt from a retailer maintaining a place of business in the State, or a retailer authorized by the Board of Equalization, given to the purchaser pursuant to the Act is declared sufficient to relieve the purchaser from further liability for the tax to which the receipt may refer. The tax required to be collected by the retailer is constituted a debt owed by the retailer to the State of California.

Every retailer maintaining a place of business in said State and making sales of tangible personal property for

storage, use or other consumption in said State (excepting certain exempt property, not material here) is required at the time of making such sales or, if the storage, use or other consumption of such property is not then taxable, at the time it becomes taxable, to collect the tax imposed by the Act from the purchaser and give a receipt therefor; also to file quarterly returns, in such form and showing such information as may be required by the Board of Equalization, accompanied by the amount of the tax required to be collected by the retailer during the period covered by the return. The Board is given discretionary power to require returns and payment of tax for other than quarterly periods. In the event of delinquency a penalty of 10% plus interest at the rate of ½ of 1% per month or fraction thereof is imposed.

Summary proceedings are authorized, whereby the Board may file with any county clerk a certificate specifying the delinquency, and such clerk may immediately (without any judicial proceeding) enter a judgment, an abstract or copy of which when recorded is given the force, effect and priority of a judgment lien against real property, and execution shall issue thereon at the request of the Board as in the case of other judgments.

The Board is authorized to give notice of such delinquency by registered mail to persons possessing or controlling any credits or other personal property of, or owing debts to, the delinquent, and thereafter no transfer or other disposition thereof shall be made without the consent of the Board or the lapse of twenty days. Persons so notified must within five days advise the Board of any and all such credits, personal property or debts possessed, controlled or owed by them.

The Board is granted the further power to seize and sell at public auction and convey title to any real or personal property of the delinquent, after giving notice by mail and

by publication. The unsold portion of any property so seized may be left at the place of sale at the risk of the retailer or other person liable for the tax.

Every retailer selling tangible personal property for storage, use or other consumption in California (whether or not it maintains a place of business there) is commanded by the Act to register with the Board, within thirty days after the effective date of the Act, and give the name and address of all agents operating in said State, the location of any and all distribution or sales houses or offices or other places of business in said state and such other information as the Board may require; also to keep such records, receipts, invoices and other pertinent papers in such form as the Board may require.

The Act prohibits the issuance of any injunction, writ of mandate or other legal or equitable process to prevent or enjoin collection of any tax therein required to be collected; and provides but one forum for the recovery by legal action of taxes paid under protest, namely, a court of competent jurisdiction in the County of Sacramento.

The Board is charged with the enforcement of the provisions of the Act and is authorized and empowered to prescribe, adopt and enforce rules and regulations relating to the administration and enforcement of the provisions of the Act.

Ruling No. 6 of the rules and regulations under said Use Tax Act of 1935, issued by the defendant (appellee) State Board of Equalization of the State of California, effective July 1, 1935 provides as follows:

> " 'Place of business' means an office or other premises regularly used by a retailer for the transaction of business.
>
> "Any person making sales of tangible personal property for storage, use or other consumption in this State maintains a place of business here if orders are solicited in this State by his agents or representatives occupying

an office or other premises in this State regardless of whether such place of business is maintained under the name of such person or under the names of his agents or representatives."

(c) Date of Decree and of Application for Appeal.

The decree sought to be reviewed is dated April 23, 1938 and was entered April 23, 1938; and the date upon which the application for appeal is presented is June 30, 1938.

(d) Nature of the Case and of the Rulings of the Court, and Grounds for Contending Questions Involved are Substantial.

The plaintiff (appellant), Felt and Tarrant Manufacturing Co., a corporation organized and existing under the laws of the State of Illinois, brought suit against the defendants (appellees), the State Board of Equalization of the State of California, the individual members thereof and the Attorney General of said State, who are citizens and residents of the State of California, to enjoin the enforcement by the defendants of provisions of the California Use Tax Act of 1935, which, as construed, applied and sought to be enforced by the defendants, constitutes plaintiff a retailer subject to the provisions of said Act.

The bill of complaint shows that plaintiff manufactures comptometers in Illinois and sells them throughout the United States; that plaintiff is not qualified to conduct intrastate business in California and conducts none there; that all sales made by plaintiff for delivery in California are made in the course of interstate commerce, upon purchase orders accepted in Illinois and obtained by or under the supervision of two general solicitors operating on a commission basis, having exclusive territorial rights and maintaining offices in the northern and southern portions, respectively, of the State of California, but having no author-

ity to sell or contract to sell plaintiff's machines, nor to render a bill or accept payment therefor.

Plaintiff, deeming itself beyond the jurisdiction of the State of California to subject it to the provisions of said Act, by reason of the fact that all its sales of tangible personal property to purchasers within that State are transactions in interstate commerce, has not complied with said provisions.

Under date of July 23, 1937, the defendant Board notified plaintiff of a determination of use tax on sales made by plaintiff to California purchasers during the period commencing July 1, 1935, and ending June 30, 1936, with interest and penalty, in the sum of $5,294.10. Thereafter, plaintiff exhausted its administrative remedies by petitioning to said Board for a redetermination and hearing upon its claim of exemption. After a hearing the Board on October 8, 1937, redetermined the amount due in the sum of $5,338.68, plus interest at the rate of $22.29 for each month or fraction thereof after October 15, 1937, and additional penalty of $445.74 if not paid by November 14, 1937.

Suit was filed herein on November 12, 1937. Plaintiff's bill of complaint alleged facts in support of the jurisdiction of the District Court under the provisions of subdivisions 1 and 14 of Section 24 of the Judicial Code (28 U. S. C., Sec. 41, Subds. 1 and 14); and alleged that the State statute, as construed and applied by the defendants, violates the commerce clause of the Federal Constitution and deprives plaintiff of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 13, of the Constitution of the State of California. Thereupon there issued a citation and a temporary restraining order and order to show cause why an interlocutory injunction should not issue. After due notice to the defendants and to the Governor of the State of California, the application for interlocutory in-

junction came on for hearing on November 27, 1937, before a three-judge court, as provided in Section 266 of the Judicial Code; the date of said hearing having been continued from November 20, 1937. At said hearing the defendants filed a return to the order to show cause, restraining order and application, and a motion to dismiss the said bill and cause upon the grounds of the insufficiency of facts, lack of jurisdictional amount, lack of Federal question, that the action is against the State of California, that the court was without jurisdiction to entertain the bill or grant the relief prayed for, that the bill does not entitle plaintiff to any relief in equity, and lack of showing of irreparable injury. The application for interlocutory injunction and the motion to dismiss were thereupon presented and argued by counsel for the respective parties and taken under submission by the court, witnout the presentation of any evidence. The application was denied and the motion to dismiss was granted. From the decree based on those rulings this appeal is taken.

The District Court in its opinion, a copy of which is appended hereto concluded that the State may require the plaintiff to collect the use tax and conform to regulations in order to insure collection thereof. The court expressed its inability to distinguish the *statute* here involved from the one upheld in the case of *Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86, and failed to recognize the distinction existing between the two cases by reason of the fact that Monamotor Oil Co. was extensively engaged in intrastate business in the taxing State, while in the case at bar the plaintiff had not submitted itself to the jurisdiction of the State of California, but had, on the contrary, confined its transactions there to the field of interstate commerce.

The court also concluded that plaintiff's method of doing business includes maintaining at least two places of business in California. Inasmuch, however, as the facts

show that said places of business were maintained solely for the furtherance of plaintiff's interstate commerce, it is believed that, even if they were maintained by plaintiff, instead of its district solicitors, the decision of the lower court is directly contrary to the doctrine of immunity recognized and reaffirmed in the decisions of the Supreme Court of the United States, such as *Cheney Brothers Company* v. *Massachusetts*, 246 U. S. 137; *Ozark Pipe Line Co.* v. *Monier*, 266 U. S. 555; and *Alpha Portland Cement Co.* v. *Massachusetts*, 268 U. S. 203. See also, *Atlantic Lumber Co.* v. *Commissioner*, 298 U. S. 553, at page 555.

Statutes imposing a tax upon the use, storage, or consumption of tangible personal property are now common devices for raising revenue in many of the United States. The principle underlying such statutes, as applied to the user, storer or consumer, has received the sanction of the Supreme Court of the United States. *Henneford* v. *Silas Mason Co.*, 300 U. S. 577. Innumerable retailers of such property including this plaintiff, are engaged in interstate commerce with purchasers of such property for use, storage or consumption in those states. The defendants here assert, and the District Court by its decision herein has sanctioned, the proposition that under the statute involved here they may reach beyond the confines of the State of California and subject a foreign corporation, which has not submitted itself to the jurisdiction of said State, to the duty of acting as their tax collector under pain of severe penalties and summary seizure and sale of its property within the state (including its accounts receivable) in the event of its failure or refusal so to act.

It is respectfully submitted that such a statute, so construed and applied, violates the commerce clause (Art I, Sec. 8, Subd. 3) and the due process clause of the Fourteenth Amendment of the Constitution of the United States, and that the plaintiff's bill of complaint and the action of the

District Court with respect thereto raise substantial constitutional questions which ought to be decided by the Supreme Court of the United States.

(e) Cases Believed to Sustain Jurisdiction.

Ex Parte Young, 209 U. S. 123, 167;
Sterling v. *Constantin*, 287 U. S. 378, 393-4;
Borden's Farm Products Co. v. *Baldwin*, 293 U. S. 194, 213;
G. A. F. Seelig, Inc., v. *Baldwin*, 294 U. S. 511, 520, *et seq.*

(f) The District Court Abused Its Discretion in Denying the Interlocutory Injunction.

The allegations of plaintiff's bill of complaint, which on motion to dismiss must be deemed admitted, showed that plaintiff's business within the State of California is exclusively interstate in character. There is nothing in the conclusions expressed by the District Court to indicate that it believed otherwise. The court expressed the view that plaintiff was maintaining at least two places of business in the State, and concluded therefrom that the provisions of the statute in question are applicable to plaintiff. It is plaintiff's contention that in passing upon the application for interlocutory injunction and the motion to dismiss the court should have recognized the authoritative force and effect of the decisions of the Supreme Court, hereinabove referred to, which prohibit taxation or regulation by a State of a foreign corporation which enters such State solely for the purpose of engaging in interstate commerce of a kind which does not involve the exercise of police power.

The court thought that a similarity of the statute involved in the case of *Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86, to the statute involved in the case at bar was sufficient justification for its action in denying to plaintiff the injunctive relief prayed for, in spite of the highly significant factual

distinction between the methods of doing business employed by the respective corporations involved in the two cases.

For these reasons it is respectfully submitted that the District Court abused its discretion in denying plaintiff's application for an interlocutory injunction. *Borden's Farm Products Co.* v. *Baldwin*, 293 U. S. 194, 213.

Inasmuch, however, as the District Court went beyond the application for interlocutory injunction, in considering the defendant's motion to dismiss, and dismissed plaintiff's bill of complaint and entire cause of action, the decree appealed from is a final disposition of the cause, in so far as it lies within the power of the District Court to make final disposition. It would seem, therefore, that this appeal may properly be treated as an appeal from a final decree, and that in such case the question of abuse of discretion in denying plaintiff's application for interlocutory injunction may be disregarded.

(g) Copy of Opinion Delivered Below.

A copy of the opinion delivered by the District Court upon rendering its decision is appended hereto. There is also appended hereto a copy of the decree made and entered in this cause.

Respectfully submitted,

THOMAS R. DEMPSEY,
A. CALDER MACKAY,
WELLMAN P. THAYER,
HOWARD W. REYNOLDS,
Attorneys for Plaintiff-Appellant.

IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

No. Eq-1284-J.

FELT AND TARRANT MANUFACTURING Co., a Corporation, *Plaintiff*,

vs.

JOHN C. CORBETT *et al.*, as Members of the State Board of Equalization of the State of California; STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, U. S. WEBB, the Attorney General of the State of California, *Defendants*.

Thomas R. Dempsey and A. Calder Mackay, Howard W. Reynolds, Wellman P. Thayer for plaintiff;
U. S. Webb, Attorney General, State of California, and Walter Bowers, Deputy Attorney General, for defendants.

Before U. S. Circuit Judge Albert Lee Stephens, U. S. District Judge William P. James, and U. S. District Judge H. A. Hollzer.

Plaintiff, an Illinois corporation engaged in the business of manufacturing and selling comptometers in that State for delivery to purchasers residing in various parts of the country, brings this suit to enjoin the enforcement of certain provisions, hereinafter noted, of the Use Tax Act of the State of California (Statutes 1935, Chapter 361). The defendants are members of the Board of Equalization (hereinafter referred to as the Board) and the Attorney General of said State.

Section 3 of the statute under attack provides in part that an excise tax is imposed on the storage, use or other consumption in the State of tangible personal property purchased from a retailer on or after July 1, 1935, for storage, use or other consumption in the State at the rate of 3% of the sales price of such property.

Section 2, subdivision (b) of this act defines the word "use" as including "the exercise of any right or power over

tangible personal property incident to the ownership of that property, except that it shall not include the sale of that property in the regular course of business."

Subdivision (f) of the same section defines "retailer" as including "every person engaged in the business of making sales for storage, use or other consumption or in the business of making sales at auction of tangible personal property owned by such person or others for storage, use or other consumption; provided, however, that when in the opinion of the Board it is necessary for the efficient administration of this act to regard any salesmen, representatives, peddlers, or canvassers as the agents of the dealers, distributors, supervisors or employers under whom they operate or from whom they obtain the tangible personal property sold by them, irrespective of whether they are making sales in their own behalf or on behalf of such dealers, distributors, supervisors or employers, the board may so regard them and may regard the dealers, distributors, supervisors or employers as retailers for the purposes of this act."

Section 3 of the same statute prescribes, in part, that every person storing, using or otherwise consuming in the State tangible personal property purchased from a retailer shall be liable for the tax imposed by the act; provided, however, that a receipt from a retailer maintaining a place of business in the State or a retailer authorized by the Board, under such rules and regulations as it may prescribe, to collect the tax imposed and who shall for the purposes of the act be regarded as a retailer maintaining a place of business in the State, given to the purchaser shall suffice to relieve the latter from further liability for the tax.

The act likewise provides that the storage, use or other consumption in the State of certain kinds of personal property is exempted from the tax, the items thus exempted consisting of property already subject to the California Retail Sales Tax Act of 1933, also motor vehicle fuel already subject to another tax, food products purchased for human consumption, property not subject to State taxation by reason of Federal or State law, and certain other items of property which for the purpose of this decision need not be enumerated.

By Section 5 of the statute every retailer selling tangible personal property for storage, use or other consumption in the State is required to register with the Board and furnish certain specified data and such other information as the Board may require.

Section 6 of the act directs every retailer maintaining a place of business in the State, and making sales of tangible personal property for storage, use or other consumption in the State not exempted under the law, to collect the tax imposed by the act from the purchaser.

Section 7 directs every retailer maintaining a place of business in the State to file quarterly returns with the Board, in such form as the latter may prescribe, showing the total sales price of the property sold, subject to the tax and also to remit with such return the amount of the tax required to be collected.

Other provisions of the statute fix penalties for failure to pay the tax within the time prescribed, also empower the Board to proceed summarily to compute and collect the tax, plus penalties and interest, also to require the retailer to keep records, etc. in such form as the Board may prescribe, such records, etc., to be subject to the Board's inspection, also prohibit the granting of injunctive relief designed to prevent the collection of the tax and limit the taxpayer to the remedy of paying the tax under protest and thereafter instituting suit for the recovery thereof in a court in the county where the State Capitol is located.

The Board has adopted various rules to enforce the provisions of the statute. By rule No. 5 it is provided that purchasers of tangible personal property the storage, use or other consumption of which is subject to the tax, should at the time of purchase of such property pay the tax to the retailer if the retailer maintains a place of business in this State and should obtain a receipt therefor from the retailer.

Rule No. 6 declares "'Place of business' means an office or other premises regularly used by a retailer for the transaction of business. Any person making sales of tangible personal property for storage, use or other consumption in this State maintains a place of business here if orders are solicited in this State by his agents or representatives oc-

cupying an office or other premises in this State regardless of whether such place of business is maintained under the name of such person or under the names of his agents or representatives."

Plaintiff's method of doing business with respect to California purchasers is substantially as follows: Pursuant to a separate contract made with each, the exclusive right to solicit orders in California is granted to two general agents, each of whom is allotted a separate section of the State. Under this contract the only compensation paid to a general agent consists of commissions on sales made. Each general agent may employ sub-agents and also a demonstrator for the purpose of demonstrating and instructing respecting the comptometers, provided such employment is approved by plaintiff. Likewise, plaintiff agrees by this contract to pay the rent of an office for each general agent, provided the lease to the same has been approved by it, such office to be used exclusively in furthering its business; also agrees to pay part of the traveling expenses incurred by each general agent, his sub-agents and demonstrators while traveling on business trips authorized by plaintiff, and also to reimburse each general agent to the extent of part of the monies advanced to a sub-agent and, in addition, in the amount of $40.00 per month toward the salary of a demonstrator. Plaintiff assumes no other financial obligation with respect to sub-agents and demonstrators. Under this contract the general agent must devote his entire time and attention to soliciting orders for plaintiff. All orders taken must be submitted to and approved by plaintiff, all sales and deliveries must be made by, and all bills for such orders as are accepted must be rendered by, the plaintiff. The general agent is prohibited from making collections and all payments must be made directly to plaintiff. The contract further requires the general agent to maintain certain records, and make certain reports and make a specified minimum number of calls on prospective customers.

The complaint further alleges that each of these two general agents maintains an office in this State, the lease to such office designating the plaintiff as lessee therein, the rent for the same being paid by plaintiff, while all other expenses of maintaining such office are paid by the general agent. As

soon as an order is accepted a particular machine is appropriated for that purpose in plaintiff's shipping department in Illinois. All machines sold for delivery in California are shipped from one of plaintiff's distributing points outside of the State. Sometimes machines are forwarded directly to the purchasers, while in other instances, in order to secure reduced freight charges, large groups of machines are shipped to the general agent who makes delivery to the respective purchasers. The only machines kept by plaintiff in California are those used as demonstrators. Plaintiff has never qualified to do intrastate business in California.

It further appears from the complaint that plaintiff has not collected any of the tax prescribed by the statute in question and has not filed any returns with the Board. It is further alleged that the defendants claim that there is due and owing by plaintiff to the State an amount equal to the tax imposed by said act on all machines sold by plaintiff for delivery in California during the period extending from July 1, 1935 to June 30, 1936, to-wit: the sum of $4457.42, plus interest amounting to $435.42, plus a penalty in the sum of $445.74. It is also alleged that defendants intend and threaten to and, unless restrained by order of court, will cause to be instituted summary proceedings to compel payment of the aforementioned sums; that defendants threaten to cause summary process to be issued for seizure and sale of plaintiff's property used by it solely in interstate commerce; also that defendants threaten to and will bring repeated suits against plaintiff for further amounts representing taxes which defendants claim plaintiff was required to collect from its California purchasers on sales made subsequently to June 30, 1936, together with penalties and interest thereon, thereby subjecting plaintiff to a multiplicity of suits and harassing litigation.

The complaint further alleges that the defendants demand that plaintiff register with said Board, also maintain various records and make reports to the Board from time to time and permit its records to be inspected by the Board's representatives. All of these threatened acts, unless restrained, it is alleged will cause plaintiff irreparable damage and loss.

While the complaint discloses that the suit is between citizens of different States, jurisdiction is based primarily upon

the charge that application of the statute in question to plaintiff violates Article I, Section 8, Clause 3, also Article I, Section 10, Clause 2 of the 14th Amendment of the Constitution of the United States, in that it is claimed that the requirements of the act constitute a regulation and a direct burden upon plaintiff's interstate commerce and that they deprive plaintiff of its property without due process of law. In addition, the complaint alleges that the application of the act to plaintiff is in violation of Article I, Sections 3 and 13 of the Constitution of the State of California.

A temporary restraining order and an order to show cause why an interlocutory injunction should not be granted having been issued, the defendants on the return day filed a motion to dismiss and also a return denying some of the material allegations of the bill. Following an oral argument the application for an interlocutory injunction and the motion to dismiss were ordered submitted.

The preliminary contention advanced by defendants to the effect that this suit in effect is a proceeding against the State and therefore the court lacks jurisdiction to entertain the same is disposed of by the rule announced in *Sterling* v. *Constantin*, 287 U. S. 378. In the latter case suit was instituted against the Governor and certain military officials of Texas to secure an injunction restraining them from enforcing certain military and executive orders regulating or restricting the production of oil from plaintiff's wells. In denying a similar objection as to alleged lack of jurisdiction the Court there said, (page 393):

> "The District Court had jurisdiction. The suit is not against the State. The applicable principle is that where state officials, purporting to act under state authority, invade rights secured by the Federal Constitution, they are subject to the process of the federal courts in order that the persons injured may have appropriate relief (citing cases). The Governor of the State, in this respect, is in no different position from that of other state officials (citing cases). Nor does the fact that it may appear that the state officer in such a case, while acting under color of state law, has exceeded the authority conferred by the state, deprive the court of jurisdiction (citing cases)."

The principal defense interposed herein is in substance that the statute under attack imposes a tax, not upon personal property while it is in transit in interstate commerce nor upon the sale thereof, but upon the privilege of use of such property after commerce is at an end, and hence the tax is not upon the operations of interstate commerce, and does not burden the same. In support of their position the defendants rely mainly on the decision rendered in *Monamotor Oil* v. *Johnson*, 292 U. S. 86. In that case suit was filed to enjoin certain officers of the State of Iowa from enforcing the provisions of the laws of that State laying a tax on motor vehicle fuel. These laws declared it to be illegal to conduct the business of a distributor of such product unless a certificate giving certain information be filed with the State Treasurer and a license be procured permitting the conduct of such business, and further required the distributor to file monthly reports with the State Treasurer showing the total number of gallons imported by him during the preceding month, with certain further details, and at the same time requiring him to remit to the Treasurer the amount of the tax. In addition, these laws defined "distributor" as "any person who brings into the State or who produces, refines, manufactures or compounds within the State any motor vehicle fuel to be used within the State or sold or otherwise disposed of by him within the State for use in the State." Likewise these laws prescribed a penalty for failure to remit the amount of the tax, also empowered the Attorney General to bring action to recover the same, authorized the State Treasurer to revoke the license of a distributor failing to comply with certain provisions, required distributors to permit inspection of their records, etc. and made it a misdemeanor for a distributor to violate any of the provisions hereinbefore mentioned.

In the case last cited the plaintiff was an Arizona corporation engaged in the business of buying, manufacturing, blending and selling gasoline and kindred products, including the importation into Iowa of gasoline by tank cars and other containers for resale to consumers and to dealers selling to consumers, and the exportation of gasoline to other states, and also in the business of maintaining storage facilities in Iowa, from which deliveries were made in that and

other states, also maintaining a refinery from which gasoline was shipped to points in Iowa and other states, and also maintaining service stations in that state which sold to consumers.

In affirming the ruling of the District Court dismissing the suit, the Supreme Court in the course of its opinion declared:

> "There is no substance in the claim that the statutes impose a burden upon interstate commerce, contrary to the prohibition of Article I, Section 8 of the Federal Constitution. The appellant insists that the tax is a direct tax on motor vehicle oil imported. The court below concluded that the law laid an excise upon the use of fuel for the propulsion of vehicles on the highways of the state. The state officials have administered the tax on this theory. We think this the correct view. The levy is not on property but upon a specified use of property. (Citing cases.) It is not laid upon the importer for the privilege of importing (citing cases), but falls on the local use after interstate commerce has ended. (Citing cases.) The statute in terms imposes the tax upon motor vehicle fuel used or otherwise disposed of in the state. Instead of collecting the tax from the user through its own officers, the state makes the distributor its agent for that purpose. This is a common and entirely lawful arrangement (citing cases.) The distributor who reports the gasoline and prays the tax is required to pass the burden on to the consumer, who is advised that in addition to the price of the gasoline he is paying a license fee to the state. To prevent evasion, the distributor must pay and pass on the tax on all gasoline imported or distributed, irrespective of its ultimate use; * * * Since the law declares that the levy is only upon use of motor vehicle fuel in the state, and the intent is not to affect interstate commerce, the state treasurer properly permits distributors to deduct as a credit * * * that which has been exported from the state by the distributor. * * *. The statute obviously was not intended to reach transactions in interstate commerce, but to tax the use of motor fuel after it had come

to rest in Iowa, and the requirement that the appellant as the shipper into Iowa shall, as agent of the State, report and pay the tax on the gasoline thus coming into the state for use by others on whom the tax falls imposes no unconstitutional burden either upon interstate commerce or upon the appellant.

"The method of imposition and collection of the tax does not deny the equal protection guaranteed by the XIV Amendment * * *. The short answer to the contention is that the statutes properly construed lay no tax whatever upon distributors, but make of them mere collectors from users of motor vehicle fuel, and refund the tax only to that class of users upon whom no excise is intended to be laid. The distributor does not pay the tax; the user does."

In a more recent decision, *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, the Supreme Court, upholding the validity of certain legislation enacted by the State of Washington, consisting of a statute levying a tax on retail sales and a statute imposing a compensating tax upon the privilege of using personal property in the state, declared:

"The practical effect of a system thus conditioned is readily perceived. One of its effects must be that retail sellers in Washington will be helped to compete upon terms of equality with retail dealers in other states who are exempt from a sales tax or any corresponding burden. Another effect, or at least another tendency, must be to avoid the likelihood of a drain upon the revenues of the state, buyers being no longer tempted to place their orders in other states in the effort to escape payment of the tax on local sales. Do these consequences which must have been foreseen, necessitate a holding that the tax upon the use is either a tax upon the operations of interstate commerce or a discrimination against such commerce obstructing or burdening it unlawfully?

The tax is not upon the operations of interstate commerce but upon the privilege of use after commerce is at an end. Things acquired or transported

> in interstate commerce may be subjected to a property tax, non-discriminatory in its operation, when they have become part of the common mass of property within the state of destination. (citing cases). This is so, indeed though they are still in the original packages. (citing cases). For like reasons they may be subjected, when once they are at rest to a non-discriminatory tax upon use or enjoyment (citing cases, including *Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86, 93) * * *. A tax upon the privilege of use or storage when the chattel used or stored has ceased to be in transit is now an impost so common that its validity has been withdrawn from the arena of debate (citing cases)."

In *Bowman* v. *Continental Oil Co.*, 256 U. S. 642, while sustaining a decree enjoining the enforcement of a license tax levied against concerns engaged in the business of importing oil and gasoline products from other states and distributing the same in New Mexico, and also enjoining the enforcement of an excise tax upon the sale of such property in that State in the original form and condition as when imported (but not upon the sale of such products in broken packages), the Supreme Court held that such decree should be "without prejudice to the right of the State through appellants or other officers, to require plaintiff to render detailed statements of all gasoline received, sold or used by it, whether in interstate commerce or not, to the end that the State may the more readily enforce said excise tax to the extent that it has lawful power to enforce it as above stated."

These decisions make it clear that a State law, such as the one here under attack, in so far as it imposes a use tax upon personal property after the same has been brought into the State, does not violate either the commerce clause or the Fourteenth Amendment of the Federal Constitution.

Accordingly, there remains for consideration only the question whether the State may require the seller to collect such tax and in connection therewith require the latter to conform to certain regulations in order to insure the collection of the tax.

We think this question must be answered in the affirmative. In this respect, we are unable to distinguish the statute here involved from the one upheld in the case of *Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86. Nor are we able to perceive wherein the plaintiff's method of selling its comptometers to California purchasers entitles it to exemption from the application of this statute. The allegations of the bill respecting this phase of the case fully warrant the conclusion that plaintiff's method of doing business includes maintaining at least two places of business in California.

For the reasons herein set forth we conclude that this action must be dismissed and it is so ordered.

Dated this 11th day of January, 1938.

H. A. HOLLZER,
U. S. District Judge.

We Concur:

ALBERT LEE STEPHENS,
U. S. Circuit Judge.

WM. P. JAMES,
U. S. District Judge.

Endorsed: Filed Jan. 13, 1938. R. S. Zimmerman, Clerk, by Murray E. Wire, Deputy Clerk.